Brief of Kearney for Petitioner

Filed Nov. 23, 1898.

Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 431.

CHARLES WINSTON, PETITIONER,

vs.

THE UNITED STATES.

BRIEF FOR PETITIONER.

GEO. KEARNEY,
Attorney for Petitioner.

CHAS. H. TURNER, *Of Counsel.*

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 11-22-'98

IN THE

Supreme Court of the United States.

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No. 431.

CHARLES WINSTON, PETITIONER,

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BRIEF FOR PETITIONER.

STATEMENT OF CASE.

This petitioner was tried in the supreme court of the District of Columbia, holding a criminal term, on March 8, 1898, under indictment 21574, for murder. He was found guilty as indicted, and on March 18, 1898, was sentenced to be executed the 25th day of May, 1898. He has been respited until January 12, 1899. Appeal was taken from said judgment to the Court of Appeals of the District of Columbia, and on June 7, 1898, said judgment was therein

affirmed, Mr. Justice Shepard dissenting. The case comes into this court by virtue of a writ of certiorari issued out of this honorable court and directed to the Court of Appeals of the District of Columbia.

ASSIGNMENT OF ERRORS.

The court erred in its interpretation of the act of January 15, 1897, entitled "An act to reduce the cases in which the penalty of death may be inflicted," (Record, pages 7 and 8).

a. In limiting the application of the act of January 15, 1897, to cases in which there are mitigating circumstances.

b. In instructing the jury under what circumstances it should or should not add the words " without capital punishment," whereas the jury should have been informed of the law and left to the free exercise of its own discretion.

c. In instructing the jury that there were no mitigating circumstances in this case (Record, page 7, line 15).

d. The trial justice invaded the province of the jury, because his charge taken in its entirety was a virtual instruction to them not to add " without capital punishment " to their verdict.

ARGUMENT.

[Assignments of Error A and B.]

The error complained of by petitioner is in the construction the court placed upon the act of Congress of January 15, 1897, entitled "An act to reduce the cases in which the death penalty may be inflicted." This act provides in the most explicit terms "that in all cases where the accused is found guilty of murder * * * the jury may qualify their verdict by adding thereto 'without capital punishment.'" There is here no ambiguity of language and no excuse to go beyond the plain words of the statute to gather the meaning of the legislators. There being no ambiguity, the accused was entitled to the full strength of the letter of the law. On this point we beg to quote from Sutherland on Stat. Const., section 247: "If the words of the statute are precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves do in such cases best declare the intention of the legislature." And, again, we find in Potter's Dwarris on Statutes the following, page 245, note 35: "A further rule is that an offender who is protected by its letter cannot be deprived of its benefit on the ground that his case is not within its spirit," citing United States *vs.* Ragsdale, 1 Hemp., 497. The words of the statute of January 15, 1897, are "precise and unambiguous;" it applies to all cases of murder. It is not competent for the trial court to limit its application to a certain class of cases, to wit, cases with mitigating circumstances. This action of the court was plainly contrary to the spirit of our criminal jurisprudence and in violation of the well-settled rule of construction of penal statutes. Especial attention is invited to Endlich, Interpretation of Statutes, sections 4 and 7.

"The legislature must be intended to mean what it has plainly expressed, and consequently there is no room for construction" (section 4). And, again, "When the words admit of but one meaning a court is not at liberty to speculate on the intention of the legislature or to construe an act according to its own notions of what ought to have been enacted. * * * The question for him is not what the legislature meant, but what the language means" (section 7).

In any event the accused was entitled to the most favorable construction of the words of the statute. (See Sutherland, Stat. Const., sections 347, 349; Endlich, Interpretation Stat., section 329; Bishop, Statutory Crimes, sections 196 and 227.)

Hence it is manifest that the trial court erred in attempting to write into the law—*i. e.*, the act of January 15, 1897—a limitation which the plain words of the act in their ordinary meaning did not contain.

2. Assuming, however, that there was any occasion for the court to go beyond the letter of the statute of January 15, 1897, to ascertain its meaning, we most respectfully submit that the court misconceived the scope and spirit of the said act.

This act was passed by the Fifty-fourth Congress, and to elucidate the meaning placed upon it by that body we quote the following:

Mr. CURTIS: "In the Fifty-third Congress a bill was introduced defining murder in the first and second degrees. The Committee on the Judiciary unanimously reported it, and it passed the House of Representatives. While pending in the Senate the Attorney General of the United States, Mr. Olney, was of the opinion that murder should not be defined as of the first and second degrees, and members of the Committee on the Judiciary of the Senate were also of the opinion that as the practice of the Federal courts is that of the

common law, it was not advisable to introduce the question of definition into the statutes, and that it was preferable to repeal such sections prescribing capital punishment for offenses which the committee thought it desirable to have abolished." * * * "In respect to the crimes of murder and rape it preserves the death penalty, but it permits, as is provided in the State of Louisiana in express terms, and in many other States in principle, that the jury may in bringing in their verdict decide whether capital punishment shall be inflicted or not by allowing the jury to add the words 'without capital punishment' to their verdict. If that clause is added, the court will sentence the accused to imprisonment for life, and if there is no recommendation, then the death penalty will be inflicted, as now provided for those crimes."

Mr. SAYERS: "I should like to know from the gentleman (Mr. Curtis) whether, where robbery is attempted and death follows, this bill modifies the punishment inflicted?"

Mr. CURTIS: "The bill allows the reduction of the penalty *in every case.* The jury decide in *each case.*" * * *

"I am sorry, I frankly say, that this is not a bill totally abolishing capital punishment" (Congressional Record, 54th Congress, 1st session, vol. 28, pt. 3, pages 2649, 2650).

3. It thus appears that this statute was adopted as a law of the United States from the State of Louisiana. (See Congressional Record, *supra.*) Attention is invited to the resemblance of the statutes.

Louisiana statute:

"In all cases where the punishment denounced by law is death it shall be lawful for the jury to qualify their verdict by adding thereto 'without capital punishment.' And whenever the jury shall return a verdict qualified as aforesaid, the person convicted shall be sentenced to hard labor for life, in the State penitentiary."

Wolff's La. Rev. Laws, 1897, sec. 1000 (Sess. Acts 1846, page 118).

United States statute:

"That in all cases where the accused is found guilty of the crime of murder or of rape * * * the jury may qualify their verdict by adding thereto 'without capital punishment;' and whenever the jury shall return a verdict qualified as aforesaid the person convicted shall be sentenced to imprisonment at hard labor for life."

29 U. S. Stat. at L., 487.

This provision of the Louisiana law, as incorporated in the act of Congress, is essentially in the same words and of precisely the same meaning. There can be no doubt that it is an adoption of the Louisiana statute.

This being so, the known and settled construction which this statute had in Louisiana prior to its enactment by Congress must be considered as having been adopted by Congress with the text thus expounded.

Willis *vs.* Eastern Trust and Banking Co., 169 U. S., 295, 307.

Allen *vs.* St. Louis Bank, 120 U. S., 20, 34.

Cathcart *vs.* Robinson, 5 Peters, 263.

The practice in Louisiana seems to be to leave absolutely to the jury the discretion of affixing or withholding the qualifying words in their verdict.

In State *vs.* Melvin (11 La. Annual, 535, 537) the following charge was given: "That juries had no right to qualify their verdict unless there were mitigating circumstances." The court, reversing this case, said:

"The qualification of the verdict [in capital cases] should be left where the law has left it—to the sound *discretion of the jury* upon the facts of the case, guided by a sense of their solemn responsibility, which is to do their whole duty to the State as well as to the accused."

4. Statutes substantially similar to the act of January 15, 1897, have been enacted in several of the States, and in

these States the practice seems to be to leave wholly to the discretion of the jury the fixing of the punishment. The trial justices of the several States appear to content themselves with a mere naked exposition of the law.

See Spain *vs.* State, 59 Mississippi, 19, 24 (1881):

"The judgment must be reversed, because of the second instruction given at the instance of the State. It limits and qualifies the right of the jury to fix the punishment at imprisonment for life, whereas the law confers on the jury this right without qualification or restriction. The *right of the jury to fix the punishment, as indicated, is without any condition. The most atrocious crime committed under the most aggravating circumstances may be punished by imprisonment for life instead of by death, if the jury so determine by its verdict.* The law demands a jury willing to be the instrument of visiting the penalty of death, and confers on such a jury the unconditional right to fix the punishment at imprisonment for life. It was erroneous to instruct the jury that its right was dependent on any state of the evidence or on any view it might take of it."

See also Walton *vs.* State, 57 Miss., 533.

Hill *vs.* State, 72 Ga., 131:

"The code leaves it in the discretion of the jury as to whether they will recommend imprisonment for life in the penitentiary of a person convicted of murder; *they are not limited or circumscribed in any respect whatever;* nor does the law prescribe any rule by which the jury may or ought to exercise this discretion. Therefore a charge that the jury, in considering the question of recommendation of mercy, should not be governed by their sympathies, but by their judgments, approved by the evidence in the case and the law applicable to it, was error."

Marshall *vs.* State, 74 Ga., 26, 31:

"They were instructed that if they found the defendant guilty of murder, they had the right to recommend that he be punished by confinement in the penitentiary for life, and if they made that recommendation, that had to be the penalty. In other words, they fixed the penalty, or they

had the right to refuse the recommendation, as they saw proper. If they failed to recommend, the prisoner might be hung, or if they recommended that he be imprisoned in the penitentiary for life, then that was the penalty fixed by law; that was a matter entirely with them, *upon which the court gave them no instruction, as he had no right to do so;* that it was a matter of which they had absolute control."

Inman *vs.* State, 72 Ga., 269, 280:

"In regard to the right of the jury to recommend imprisonment for life, the better practice is for the court to call the attention of the jury to the law and merely state to them that if they think proper they may, in addition to the verdict of guilty, recommend that defendant be imprisoned in the penitentiary for life."

See Doran *vs.* State, 7 Texas Ct. App., 385.
Myers *vs.* State, 8 Texas Ct. App., 321.

See also—

Cyrus *vs.* State, 29 Southeastern Reptr., 917, decided Nov. 15, 1897.

In California, it seems, a contrary view was taken for a time, but the older cases were overruled in People *vs.* Leary, 105 Cal., 486, and People *vs.* Kamaunu, 110 Cal., 609.

Indeed, the earlier case of People *vs.* Bawden (90 Cal., 195, 198) sharply criticises the action of a trial judge in instructing the jury upon this point:

"The legislature having confided to the *discretion of the jury* the fixing of the penalty of death or confinement in the State prison for life upon a verdict of guilty of murder in the first degree, the discretion of the jury in that matter is absolute."

People *vs.* Leary, 105 Cal., 486, 495.

"Discretion is given to the jury in regard to the punishment in case they find a defendant guilty of murder in the first degree, and the *court cannot direct or advise them upon the subject further than to inform them of their province.*"

People *vs.* Kamaunu, 110 Cal., 609, 613.

The only text-writer we find who has touched this subject at all is McClain, who, in section 363 of his recent work on Criminal Laws, says:

"By some statutes a discretion is left to the jury in determining the punishment, * * * and the court should not in any way interfere by instruction with the discretion of the jury."

5. Several murder cases have been tried in United States courts under the act of January 15, 1897, and while these cases are not reported, we append certified extracts from the charges of the trial justices taken from the stenographic notes.

In the case of The U. S. *vs.* J. W. Lewis the court charged as follows relative to a qualified verdict:

"A killing upon either express or implied malice in this court is murder, and upon conviction is punishable by death unless the jury in their discretion see proper to add to their verdict 'without capital punishment.' In that state of the case it is penitentiary for life.

"If you find the defendant guilty of murder, the form of your verdict will be: 'We, the jury, find the defendant, J. W. Lewis, guilty of murder in the Indian Territory, as charged in this indictment,' and if you see proper to add 'without capital punishment,' you simply add the words 'without capital punishment,' date it, and sign it by your foreman."

In the case of George De Laughter *et al.* the court charged as follows:

"Which the law does not reduce to manslaughter, and does not excuse upon the ground of self-defense. It is murder and is punishable by death unless the jury in their discretion see proper to add to their verdict 'without capital punishment.' In that event, you will find the defendant guilty as charged in the indictment, and if you see proper so to do, add to your verdict 'without capital punishment.'"

"Before the undersigned authority this day appeared Emma Keeler, who, being duly sworn, deposes and says that she is and was at the date of the trials of the cases of The U. S. *vs.* J. W. Lewis and The U. S. *vs.* George De Laughter *et al.*, charging the defendants with murder in the Indian Territory, the official stenographer of the U. S. courts at Paris, Texas; that the above and foregoing are true and correct copies of the charges delivered by the court relating to a qualification of the verdicts to be found by the juries, and are the only references in said charges regarding said qualifications.

"EMMA KEELER,
"*Official Stenographer U. S. Courts, Paris, Texas.*

"Subscribed and sworn to before me this 17th day of October, 1898.

[SEAL.] "C. DART,
"*Clerk U. S. Circuit Court, E. Dist. Texas,*
"By H. H. KIRKPATRICK, *Deputy.*"

"Clerk's Office U. S. Circuit Court, District of Massachusetts;
Alex. H. Trowbridge, clerk.

"BOSTON, *Sept.* 29, 1898.

"GEORGE KEARNEY, Esq.

"DEAR SIR: I have yours of yesterday, and in reply inform you that the judge, in charging the jury in the Bram case, used the following words relative to the giving of a qualified verdict:

"'Gentlemen, under the law of the United States, as it now stands, your verdict may be either 'guilty,' 'not guilty,' or 'guilty, without capital punishment.'" This is all that the court said about it. It is copied from the typewritten report made for court and counsel, taken from the stenographer's notes.

"Yours truly, ALEX. H. TROWBRIDGE, *Clerk.*"

6. In view of the foregoing, it would appear that if there existed any reason to attempt to *construe* a law so plain in its letter as the act of January 15, 1897 (which we deny), that the trial justice misconceived the spirit of that act. It

plainly was not the intention of Congress to divide the crime of murder into two degrees. Therefore to limit the application of this act to cases that have mitigating circumstances was beyond the power of the trial judge and was manifest error.

[Assignments of Error C and D.]

The trial justice also charged the jury in this case:

"There is no evidence that has been adduced which tends to show any palliating or mitigating circumstances."
Record, page 7, line 15.

This, we submit, is "plain error," and we invoke the rule in favor of the petitioner's life.

The judge's charge made the kind of punishment dependent upon the existence or non-existence of mitigating circumstances; it was therefore error striking at the very root of the case to have charged the jury that there were no mitigating circumstances. The charge was based on the theory that the law under consideration divided murder into "cases with mitigating circumstances" and "cases without mitigating circumstances," the punishment for cases "with mitigating circumstances" being life imprisonment and the punishment for cases "without mitigating circumstances" being the death penalty.

If this theory be correct, then the judge's charge that there were no mitigating circumstances in this case eliminated from the consideration of the jury that class of cases the punishment for which is life imprisonment, and made it obligatory upon them to impose the death penalty.

Similar to this is the case of Hopt *vs.* Utah, 110 U. S., 574, 582, where under a statute it is for the jury to say whether the facts make a case of murder in the first or second degree the trial judge told the jury: "That an atrocious and das-

tardly murder has been committed by some person is apparent." This court said that this instruction was naturally regarded by them as an instruction that the offense, by whomsoever committed, was murder in the first degree.

"There is a concurrence of opinion that instructions imperatively requiring the jury to return a verdict of guilty of either degree of murder, or which, by the *expression* or *intimation* of the opinion of the judge, infringe upon their exclusive province to ascertain and declare the degree, are essentially erroneous."

Brown *vs.* State, 109 Ala., 70, 77.

7. The jury in this case were plainly told that they should only qualify their verdict under "palliating circumstances which would seem to justify and require it," and they had been told with equal directness that "no evidence has been adduced which tends to show any palliating or mitigating circumstances."

This, it is submitted, is a direction to the jury not to add the qualifying words to their verdict in this case.

It is a virtual denial of this statute to this accused, and leaves him in no better plight than a refusal to acquaint the jury with the provisions of the statute of January 15, 1897, would have done, which would have been palpable error.

See Calton *vs.* Utah, 130 U. S., 83.

The syllabus of which case is as follows:

"In a conviction for murder in the first degree in Utah: Held, that the court erred in not directing the attention of the jury to the provision of the penal code as to their right to recommend imprisonment for life, at hard labor, in the penitentiary in place of the punishment by death.

"By such action the court deprived the prisoner of a substantial right."

And, finally, it is respectfully submitted that the charge of the trial judge, taken in its entirety, was a direction to

the jury not to add the qualifying words to their verdict in this case. It is nowhere denied that, in any view of the law, to the jury must be left at last the right to make up their verdict on this, as well as every other part of the case; and this, we apprehend, is equally true, even if it be considered proper for the trial justice to advise and instruct them upon this point. The jury must finally be left untrammeled to add or withhold the qualifying words as they see fit. Such necessary freedom of action, we contend, was denied the jury in this case. We quote from the dissenting opinion of Mr. Justice Shepard in this case: "With such instructions as were given in this case, no jury composed of good citizens, accustomed, as it is their duty, to accept and apply the law as given them in charge by the court, could have extended clemency to any one of these appellants. * * * It did not give the accused the benefit of the statute."

GEO. KEARNEY,
Attorney for Petitioner.

CHAS. H. TURNER, *Of Counsel.*

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 432.

WILLIAM M. STRATHER, PETITIONER,

vs.

THE UNITED STATES.

BRIEF OF THE PETITIONER.

STATEMENT OF THE CASE.

The petitioner, William M. Strather, was tried in the supreme court of the District of Columbia, holding a criminal term, on the 7th, 8th, 9th, and 10th days of February, 1898, under indictment numbered 21474, for murder, and the jury returned a verdict of guilty as indicted, and the petitioner was sentenced on the 4th day of March to be executed on Thursday, the 5th day of May, 1898. The petitioner prayed an appeal to the Court of Appeals of the District of Columbia from that portion of the instruction of the trial court to the jury that related to the act of January 15, 1897. The

Court of Appeals on the 7th day of June, 1898, affirmed, by a divided court, the judgment and sentence of the lower court. The petitioner, on the 11th day of October, 1898, filed a petition in this court for a writ of certiorari to the Court of Appeals, and on the 31st day of October, 1898, this court granted the said writ as prayed. The petitioner comes before the court today for the purpose of having this honorable court review and determine whether or not the Court of Appeals erred in affirming a judgment of the lower court based on a verdict upon instructions which petitioner claims were prejudicial to him and not permissible under right construction of the act of January 15, 1897, and that if injustice has been done him the said judgment of the Court of Appeals may be reversed.

ASSIGNMENTS OF ERROR.

The Court of Appeals of the District of Columbia erred in affirming the judgment and sentence of the trial court in that part of its charge to the jury which related to the construction of the statute of January 15, 1897, as follows (page 11 of the Record):

"I have no doubt that this act of Congress was intended to serve some useful purpose. The penalty for murder has not been disturbed by this act of Congress; it is fixed by law; the jury neither make nor unmake it. Doubtless the intention of the legislature was this: that in a case in which the jury reach the conclusion that the party on trial is guilty of murder circumstances are shown by the evidence that are of a palliating nature they may give the defendant the benefit of those palliating circumstances and say in their verdict 'without capital punishment.' If, however, the jury believe that there are no palliating circumstances it is their duty not to add anything, but to leave the penalty as it stands. It may be that a provision of this kind in the law was intended to apply to a case somewhat like that suggested by the District attorney. Suppose a man knowing

that his wife had been in improper relations with another man and roused to anger by such knowledge, but postponing from time to time, while he meets this man, the execution of his vengeance upon him, he finally concludes to and does kill him, that would be murder—a clear case of murder under the law; but those circumstances might be such as would convince the jury that the extreme penalty of the law ought not to be inflicted. There may be other cases; I simply give this as an illustration. But the object of this penalty, gentlemen of the jury, is to protect society, and the jury should not interfere with it under any circumstances, unless the circumstances are such as to satisfy them that this provision should be added to the verdict."

ARGUMENT.

The act of January 15, 1897, is as follows:

"An act to reduce cases in which the penalty of death may be inflicted, vol. 29, Statutes at Large, page 487.

"That in all cases where the accused is found guilty of the crime of murder or of rape under section fifty-three hundred and thirty-nine or fifty-three hundred and forty-five, Revised Statutes, the jury may qualify their verdict by adding thereto 'without capital punishment,' and whenever the jury shall return a verdict qualified as aforesaid, the person convicted shall be sentenced to imprisonment at hard labor for life."

The trial court, in charging the jury, said (Record, page 11):

"The penalty for murder has not been disturbed by this act of Congress; it is fixed by law; the jury neither make nor unmake it."

Before the law of January 15, 1897, was passed the punishment for murder was death penalty, but the new law makes a specific change by providing "that in all cases the jury may qualify their verdict," which qualified verdict calls for life imprisonment.

It is the duty of the courts to confine themselves to certain rules in the construction of statutes.

Potter's Dwarris on Statute and Constitution, at page 200, says:

"It is the duty of the courts to confine themselves to the words of the legislature, nothing adding thereto, nothing diminishing. We must not import into an act a condition or qualification which we do not find."

"If the words of the statute admit of but one meaning, a court is not at liberty to speculate on the intentions of the legislature or to construe an act according to its own notions of what ought to have been enacted."

Endlich Interpretation of Statutes, secs. 4 and 7.

The lower court in its charge to the jury *speculated*, in part, as follows (Record, page 11):

"Doubtless the intention of the legislature was this: that in a case in which the jury reach the conclusion that the party on trial is guilty of murder circumstances are shown by the evidence that are of a palliating nature they may give the defendant the benefit of those palliating circumstances and say in their verdict 'without capital punishment.' If, however, the jury believe that there are no palliating circumstances *it is their duty not to add anything, but to leave the penalty as it stands.* It may be," continued the judge, "that a provision of this kind in the law was *intended* to apply to a case somewhat like that suggested by the District attorney. Suppose that a man knowing that his wife had been in improper relations with another man and roused to anger by such knowledge, but postponing from time to time, while he meets this man, the execution of his vengeance upon him, he finally concludes to and does kill him, that would be murder—a clear case of murder under the law; but those circumstances might be such as would convince the jury that the extreme penalty of the law ought not to be inflicted. There may be other cases. I simply give that as an illustration."

"It is, therefore, only in the construction of statutes whose terms give rise to some ambiguity or whose grammatical construction is doubtful, that courts can exercise the power of controlling the language in order to give effect to what

they suppose to have been the real intention of the law-makers."

George *vs.* B'd of Educ'n, 33 Ga., 344.
Newell *vs.* People, 7 N. Y., 97.

Justice Shepard, of the Court of Appeals, in his dissenting opinion, on page 12 of the record, says:

"With such instructions as were given in this case, no jury composed of good citizens accustomed, as it is their duty, to accept and apply the law as given them in charge by the court could have extended clemency to any of these appellants."

The court says in Steer *vs.* Brownwell, 124 Ill., 27:

"But a court cannot insert words into a statute which were not used by the legislature, for its province is to ascertain the meaning of a statute from the words used without adding thereto or taking therefrom."

Potter's Dwarris on Statute and Constitution, at page 143, says:

"It is not permitted to interpret what has no need of interpretation. When an act is expressed in clear and precise terms; when the sense is manifest and leads to nothing absurd, there can be no reason not to adopt the sense which it naturally presents. To go elsewhere in search of conjectures in order to restrain or extinguish it is to elude it."

"In construing statutes the accused is entitled to the most favorable construction of the words of the statute" (Sutherland, Stat. Const., sec. 349; Endlich, Interpretation Statutes, sec. 329; Bishop, Statutory Crimes, secs. 196 and 227).

The framers of the act of January 15, 1897, meant what the statute says—no more and no less—as the following discussion will show when the bill was under debate in the House of Representatives, 54th Congress, 1st session, vol. 28, pt. 3, pages 2649, 2650:

Mr. SAYERS: "I should like to know from the gentleman, Mr. Curtis, whether, where robbery is attempted and death follows, this bill modifies the punishment inflicted?"

Mr. CURTIS: "The bill allows the reduction of the penalty in *every case*. The jury decides in each case. I am sorry, I frankly say, that this is not a bill totally abolishing capital punishment."

There is no question from the above but that Congress intended that the jury should decide in each case uncontrolled by the advice of the court, and, if they saw fit, to reduce the penalty in every case, irrespective of palliating or other circumstances.

It is a familiar canon of construction that "a thing which is within the intention of the makers of the statute is as much within the statute as if it were within the letter; and a thing within the letter of the statute is not within the statute unless it be within the intention of the makers."

"The intention of the legislature should always be considered in giving construction to a statute" (Orndoff *vs.* Turman, 2 Leigh, 200).

"In construing statutes, courts, in order to ascertain the intention of the legislature, will judicially notice such contemporaneous history as led to and probably induced the passage of the laws" (5 Conn. Mut. Ins. Co. *vs.* Talbot, 113 Ind., 373).

"Courts have no dispensing power over statutes; where they contain no exceptions the courts can make none. If they are too rigid in their terms, the remedy is with the legislature" (Box *vs.* Stanford, 13 Smedes & M., 93; 51 Am. Dec., 142).

In the State of Georgia the statute leaves it in the discretion of the jury as to whether they will recommend imprisonment for life in the penitentiary of a person convicted of murder.

In Hill *vs.* State, 72 Ga., 132, the lower court in substance said:

"You must be governed by your judgment, approved by the evidence in the case and the law applicable to it, and then say, What is your duty as twelve upright sworn jurors."

The supreme court said:

"This law does not prescribe any rule by which the jury may or ought to exercise this great discretion. It does not say that the jury are not to be governed by their judgment as instructed by the court below. The court below imposed by its charge restrictions upon the jury unauthorized and unwarranted by the statute."

The supreme court said, in Inman *vs.* State, 72 Ga., 280:

"In cases like this we think the better practice would be for the court to call the attention of the jury to the law and merely state to them, if they thought proper they might, in addition to the verdict of guilty, recommend that the defendant be imprisoned in the penitentiary for life."

In the case of Johnson *vs.* State, 58 Ga., 491, the supreme court said:

"Morever, the charge in that case confined the right of the jury in this, that the court charged that if there were no circumstances to justify you in recommending him to the mercy of the court, 'Why, then, you ought not to do it.' Such a charge as that would be error under the statute in respect to punishment for murder, because it said to the jury that they ought not to recommend to mercy unless such and such was proved."

Chapter 58, section 2, of the Laws of Mississippi, reads as follows:

"That in all cases where any person or persons, upon conviction of crime, shall or may be punished with death, the jury may, in their discretion, in their verdict declare that the penalty or punishment shall be imprisonment in the penitentiary for life; but if the jury shall omit to so declare the penalty in their verdict, then the court shall pronounce the death penalty."

Spain *vs.* State, 59 Miss., 19, 24, the court said:

"The most atrocious crime committed under the most aggravating circumstances may be punished by imprisonment for life instead of by death, if the jury so determines by its verdict. The law demands a jury willing to be the instrument of visiting the penalty of death and confers on such a jury the unconditional right to fix the punishment at imprisonment for life. It was erroneous to instruct the jury that its right was dependent on any state of the evidence or on any view it might take of it."

See also Walton *vs.* State, 57 Miss., 533.

McClain in his work on Criminal Law, section 363, says:

"By some statutes a discretion is left to the jury in determining the punishment, and the court should not in any way interfere by instruction with the discretion of the jury."

In State *vs.* Melvin, 11 La. Annual, 535, 537, the court said:

"The qualification of a verdict should be left where the law has left it, to the sound discretion of the jury upon the facts of the case, guided by a sense of their solemn responsibility, which is to do their whole duty to the State as well as to the accused."

The practice in Louisiana is to leave absolutely to the jury the discretion of affixing or withholding the qualifying words in their verdict, and the statute of January 15, 1897, was taken from that State. (See statute of Louisiana, act of May 29, 1856.) Therefore in construing the statute of January 15, 1897, it ought to be given the same construction that it receives in that State.

"The statute from State or country where they become the subject of adjudication in another, are to receive the same construction that is given to them in the courts of the former."

Elmendorf *vs.* Terry, 10 Wheat, 153.

Smith *vs.* Coudry, 1 How., 28.

"The construction of a statute of a court of the State where it is enacted should be followed in the courts of other States."
Cave *vs.* Cushman, 3 Watts, Sec. 544; 39 Amer. Dec., 47.

Since the act of January 15, 1897, several murder cases have been tried in different United States courts, and they charged the juries with relation to the statute in the following manner:

In the eastern district of Texas, at the April term, in 1898, in the case of George De Laughter, Mr. Justice Bryant said:

"In the event you find the defendant guilty as charged in the indictment, and if you see proper so to do, add to your verdict 'without capital punishment.'"

In the case of J. W. Lewis, tried at the same term of the Texas court, the judge charged the jury as follows:

"A killing, upon either express or implied malice, in this court is murder, and, upon conviction, punishable by death, unless the jury in their discretion see proper to add to their verdict, 'without capital punishment.' In that State of the case it is penitentiary for life."

United States *vs.* Bram, tried in the United States court at Boston, the court said:

"Gentlemen, under the law of the United States, as it now stands, your verdict may be either guilty, not guilty, or guilty, without capital punishment."

In the majority opinion of the court of appeals the court said, on page 15 of the record of this case:

"But Congress has not abolished capital punishment for murder, but has made the degree of punishment to depend upon the special circumstances of each case as they may be found by the jury. In many of the States, as we know, if not in a majority of them, it has long since been deemed proper and just to divide the common-law crime of murder into first and second degrees, and prescribe the punishment accordingly."

In the Congressional Record, Fifty-fourth Congress, first session, vol. 28, part 3, pages 2649–2650, it will be seen where Mr. Curtis, on the floor of the House, spoke as follows:

"Mr. CURTIS: In the Fifty-third Congress a bill was introduced defining murder in the first and second degrees. The Committee on the Judiciary unanimously reported it, and it passed the House of Representatives. While pending in the Senate the Attorney General of the United States, Mr. Olney, was of the opinion that murder should not be defined as of the first and second degrees, and members of the Committee on the Judiciary of the Senate were also of the opinion that as the practice of the Federal courts is that of the common law it was not advisable to introduce the question of definition into the statute, and that it was preferable to repeal such sections prescribing capital punishment for offenses which the committee thought it desirable to have abolished."

Continuing, the court said, on page 16 of the Record:

"This finding, however, should be made with reference to the facts of the case, as it is manifest that it was never intended that a party shown to have committed the crime under the most revolting and atrocious circumstances should receive the qualified or mitigated punishment, and a party under much less revolting and atrocious circumstances should or might receive punishment by death, according to the temper and notions of different juries trying the parties."

Again the court said, on page 16 of the record:

"In construing a statute it is not only the letter but the spirit, the reason, and legislative intent that must be regarded, and that, in all cases, presents a question for the court. And in the statute under consideration there is nothing to indicate an intention on the part of Congress to divest the court of its legitimate function in cases where the provision of the statute is applicable."

The courts are only called upon to construe statutes when they are ambiguous and uncertain in their meaning. The statute under consideration, we contend, needed no con-

struction by the lower court, and when the trial judge said: "Doubtless the intention of the legislature was this: that in a case in which the jury reach the conclusion that the party on trial is guilty of murder, circumstances are shown by the evidence that are of a palliating nature, they may give the defendant the benefit of those palliating circumstances and say in their verdict 'without capital punishment,'" he made the statute ambiguous and uncertain in its meaning and intent.

Justice Shepard, of the Court of Appeals, in his dissenting opinion, said, on page 20 of the record:

"I cannot accept as sound the argument that the purpose of Congress in this enactment was substantially the same as shown in the legislation of the States, whereby the offense of murder has been divided into two degrees—murder of the first degree and murder of the second degree. In the enforcement of those statutes the courts are required to declare the law to the jury in application to the facts. Where the evidence shows plainly that the accused, if guilty at all, is guilty of murder of the first degree and nothing less, it is the duty of the court to withhold from the jury the privilege of returning a verdict of guilty of murder of the second degree. The court is not required to submit the question of the degree of guilt to the jury regardless of the evidence, as under the act of Congress it is compelled to extend to them the privilege of commuting the death penalty. If the purposes of the two sets of statutes are the same, it would be more reasonable to hold that under the act of Congress the right to commute the death penalty should not be accorded to the jury at all unless the evidence should discover something tending to warrant the exercise of clemency."

If this court shall be of the opinion that the contentions of petitioner are well founded, it is very respectfully submitted that the judgment of the Court of Appeals should be reversed.

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